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No. 111

IN THE

Supreme Court of the United States

October Term, 1949

William C. Bandowski and Kate Sobieski, *Petitioners*,

v.

Sinclair Refining Co., Individually and as General Counsel, Chairman and Member Respectively of, and Constituting the National Labor Relations Board,

REPLY OF PETITIONERS TO BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 444

WILLIAM F. BANDLOW AND KAYE SORENSON, *Petitioners*

v.

STUART ROTHMAN, *et al.*, Individually and as General Counsel, Chairman and Members Respectively of, and Constituting the NATIONAL LABOR RELATIONS BOARD,

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REPLY OF PETITIONERS TO BRIEF FOR RESPONDENTS IN OPPOSITION

ADDITIONAL REASONS FOR GRANTING WRIT OF CERTIORARI

Petitioners are impelled to invite the attention of the Court to the following additional facts which they sincerely believe militate for this Court granting the Petition for Certiorari herein filed:

This cause had its inception when the union fined petitioners and numerous other employees for refusing

to take part in strike activities, and thereafter brought suit in a state court to enforce the fines.

A second cause currently in the Courts and having its inception in the same incident, is *U.A.W. Local 248 v. Wisconsin Employment Relations Board*, Wisconsin Supreme Court, Nos. 59 and 60, 29LW2167, presently pending decision after rehearing. The issue involved is whether the Taft Hartley Act deprives the Wisconsin Employment Relations Board of jurisdiction to prevent unions from threatening members with fines if they refuse to take part in strike activities called by the union.

A third cause currently pending in the United States Circuit Court of Appeals for the 7th Circuit, and which similarly had its inception in the same incident as this cause, is *N.L.R.B. v. Allen-Bradley Co.*, (127 NLRB No. 8,) No. 13042. The case involves an enforcement proceeding, the issue being whether the employer's insistence that the union agree not to discipline, discharge or fine any employee for exercising his Taft-Hartley Act right to engage in union activities or to refrain from such activities constitutes an unlawful refusal to bargain. 28 LW 2546.

Patently, if this Court were to grant petitioners prayer for a Writ of Certiorari in this cause, so that the questions which are important for the orderly administration of the Act and the fulfilment of its purposes could be answered by this Court, such a multiplicity of suits, both State and Federal, would be obviated.

The alternative is to leave unanswered the three questions presented to this Court in the petition for

certiorari, plus the additional questions already presented for decision in the lower State and Federal forums by the two cases immediately above cited, for which no precedents have yet provided an answer. Additionally, until this Court provides an answer, every employee who is a union member is subject to being deprived of the emoluments of his labors, by having them confiscated in whole or in part by his union whenever it wishes to "fine" such a member who refuses to take part in any union activity in which a union dictates he must take part.

The alternative to a final decision by this Court on the questions presented is for every union to insure that its rules provide that the proper conduct of its "internal affairs" requires every member to take part in any and all affairs it may enumerate under penalty for their failure to do so. Absent a decision by this Court on the questions presented, the posture of the decision of the lower court in this case sanctions such a result.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Coming now briefly to a reply to respondents' Brief in Opposition we believe the Court's attention should be invited to the following:

Petitioners have presented for consideration by this Court three questions dealing respectively with (1) employees' rights under Section 7, and (2) Section 8b(1)(A) of the Act, and (3) the alleged complete immunity of the General Counsel of the Board from any judicial restraint or correction. (Pet. 2). Therefore, respondent's reference to only the third of the three questions, as being the only question presented for decision, is erroneous. (B.R. 2).

Surely an answer by this Court to the third of the three questions presented, namely, the jurisdiction of the federal courts over the General Counsel, would not necessarily be dispositive of the other two questions presented. By the same token, an answer to either, or both, of the first two questions presented, would not necessarily be dispositive of the third. Certainly, were this Court to declare, in answer to the third question, that no provision existed to permit review of any decision of the General Counsel, however, arbitrary or illegal, it would not of necessity follow that employees have no rights whatever under Section 7 of the Act, nor that unions may prescribe *any* rules, other than those with respect to the acquisition or retention of membership, irrespective of how coercive or restraining of employees' exercise of their Section 7 rights such rules may be.

The brief for respondents (B.R. 6, footnote 3) refers this Court to a statement made by Senator Taft during the congressional debates, allegedly in partial support of their contention that it was the "congressional intent to preclude judicial review of the General Counsel's decisions—." The other foot alleged to support their contention is that such intent is "clear from the language of the statute." This purported clarity is not sufficiently identified for ease of reference, and would not seem, therefore, to comport with this Court's requirements, as outlined in *Brownell v. We Shung*, 352 U.S. 180 in which it held:

> "—to darken the meaning of the word 'final' as used by Congress by giving it chameleonic characteristics is to indulge in choplogic. * * * Furthermore,—such a 'cutting off' of judicial review 'would run counter to section 10 and section 12 of

the Administrative Procedure Act.' 349 U.S. at 51 'Exceptions from the—Administrative Procedure Act are not lightly to be presumed,' *Marcello v. Bonds*, 349 U.S. 302, 310 (1955), and *unless made by clear language or supersedure* the expanded mode of review granted by that Act cannot be modified. We therefore conclude that the finality provision of the 1952 Act—refers only to administrative finality." (Emphasis supplied.) See also Heikkila v. Barber, 345 U.S. 229.

The reference to Senator Taft's statement seems equally inept in view of its content which stated:

"Section 7. In this section guaranteeing the right of employees to self-organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, there has been inserted the language 'and shall also have the right to refrain from any and all of such activities * * *.' It is contended that the inclusion of the new language destroys collective bargaining and legalizes the device of the yellow-dog contract. Nothing could be further from the truth. There is similar language in the Norris-LaGuardia Act, a statute outlawing the yellow-dog contract. Moreover, the Board itself has held that a right to refrain from the exercise of the rights guaranteed in section 7 was always implicit in the Wagner Act. (See Pittsburgh Plate Glass Co., 66 NLRB 1083.) The new language therefore, merely makes mandatory an interpretation which the Board itself had already arrived at administratively. The reason for its inclusion was that similar language had appeared in the House bill and since section 8(b)(1) of the Senate bill, which was retained by the conferees, made it an unfair labor practice for labor organizations to restrain or coerce employees in the rights guaranteed them in section 7, the House conferees insisted that there be express language in Section 7, which would make the pro-

> hibition contained in section 8(b)(4) apply to coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or a picket line. 93 Cong. Rec. 6859

In view of the fact that petitioners invited the attention of the Court to this portion of the legislative history of the Taft-Hartley Act in support of their position (P. 10, 11), it is difficult to determine, from a reading of the plain wording of that reference, that respondents can find therein any solace for their position. The language clearly states, in effect, that the language of Section 8(b)(1) of the Act was merely further assurance to prohibit coercive acts by unions against employees who did not wish to join, or did not care to participate in a strike or picket line, as the National Labor Relations Board itself had always held that the right to refrain from the exercise of rights guaranteed in section 7 of the act had always been implicit in the Wagner Act.

Additionally, in view of the fact that respondents tacitly admitted some time ago, while this cause was pending before the United States District Court of the District of Columbia, (R. 79) that petitioners' contention (R. 47-51) was correct, namely that the alleged legislative history relied on for support by the Board in the *Minneapolis Star* case, (109 NLRB 727), and thereafter by the General Counsel in support of his position of inaction in the present cause, pertained strictly to the enactment of section 8(a)(3)(B) of the Act, and not to section 8(b)(1)(A) of the Act, it is difficult to divine at this point respondents search for support of its position in the alleged legislative history of the enactment.

It has been petitioners' contention that where statutory language is clear and unambiguous on its face it must be applied as written, and that arguments of policy or resort to the legislative history of an enactment become relevant only where the statutory language is not clear or is ambiguous on its face. (R. 61-62). This entire case arose from the refusal of respondents to heed the interdependent guarantees given to employees by sections 7 and 8(b)(1)(A) of the Act and by refusing to recognize the language in section 8(b)(1)(A) thereof which permits labor organizations to prescribe its own rules *with respect to the acquisition or retention of membership therein.* The only support to which respondents can point in support of their position is the alleged legislative history, which supports only an entirely different section of the Act and not section 8(b)(1)(A), which is the section involved in this case.

CONCLUSION

For the foregoing reasons, petitioners earnestly pray that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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